

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 89-5

January 11, 1989

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Joseph E. DeSio, Associate General Counsel

SUBJECT: EAJA Model Letters

As noted in Memorandum 81-55, Casehandling Guidelines Relating to the Equal Access to Justice Act, Regions are required to document the extent to which a charged party fails to cooperate in an unfair labor practice investigation.

One of the proposals submitted to the General Counsel's Special Planning Committee was that Regions should develop a more uniform approach in their documentation of noncooperation by a charged party during an unfair labor practice case investigation. The proposal was based on the premise that specific EAJA language in our initial and subsequent letters to the charged party would result in greater cooperation from the charged party and would also limit the potential Agency liability in any subsequent, related EAJA litigation.

As a result of our review of this proposal, we are providing you with the enclosed model letters. While the precise language in the model letters need not be used, they are offered so that all Regions will have readily accessible model-type letters that all employees can easily use to document the extent of the charged party's noncooperation.

If you have any questions regarding this memorandum, please contact your Assistant General Counsel.


J.E.D.

Attachments

cc: NLRBU

MEMORANDUM OM 89-5

Re:

Board Agent:
Telephone:

This is to inform you that a charge, a true copy of which is enclosed, was filed in the above-entitled matter.

This case has been assigned to the Board agent shown above. When the Board agent solicits relevant evidence from you or your counsel, I request and strongly urge you or your counsel to promptly present to the Board agent any and all evidence relevant to the investigation. It is my view that a refusal to fully cooperate during the investigation might cause a case to be litigated unnecessarily. Full and complete cooperation includes, where relevant, timely providing all material witnesses under your control to a Board agent so that witnesses' statements can be reduced to affidavit form, and providing all relevant documentary evidence requested by the Board agent. The submission of a position letter or memorandum, or the submission of affidavits not taken by a Board agent does not constitute full and complete cooperation.

Enclosed is a form requesting commerce data which should be completed, signed by you and returned in the enclosed envelope addressed to my attention.

Attention is called to your right, and the right of any party, to be represented by counsel or other representative in any proceeding before the National Labor Relations Board and the courts. If you choose to have a representative appear on your behalf, please complete NLRB Form 4813 which may be used if you choose to have your agent receive exclusive service of all documents and communications except those expressly excluded. Please note that NLRB Form 4701 may be executed by your designated representative, but that NLRB Form 4813 will not be honored unless it is signed by you as a party.

I would appreciate receiving from you promptly a full and complete written account of the facts and a statement of your position with respect to the allegations set forth in the charge. Attached is a statement (Form NLRB-4541) briefly setting forth procedures followed in the processing of unfair labor practice charges, which we trust will be helpful to you.

Sincerely,

Enclosures

EAJA Model Letter B

This letter confirms my telephone conversation with you of _____ in which I requested you to promptly provide evidence, including witnesses from whom I would take affidavits. I specifically stated that alleged unfair labor practices had been attributed to _____ in evidence submitted by the Charging Party.

You took a position of less than complete cooperation by stating

By failing to promptly provide evidence, including witnesses from whom I might take affidavits, it appears that you are not cooperating fully in the investigation. Absent the submission of such evidence, the Regional Director will make his/her decision based on the evidence available. Accordingly, I ask and urge you to present your evidence, including witnesses for the purpose of giving affidavits, by close of business _____ (date) so that it may be considered in my recommendation to the Regional Director.

Sincerely,

Board Agent

EAJA Model Letter C

This letter is in response to your position letter in which you stated that I should contact you if additional information were needed.

As I explained earlier, the submission of a position letter, or memorandum, or the submission of affidavits not taken by a Board agent does not constitute full and complete cooperation. Notwithstanding this fact, your position letter raises certain questions. More specifically,

(Insert questions)

I again ask and urge you to promptly present evidence, including witnesses for the purpose of giving affidavits, by close of business (date) . Absent the submission of such evidence, the Regional Director will make his/her decision based on the evidence available.

Sincerely,

Board Agent

EAJA Model Letter D

This is to confirm that I will be meeting with witness X at your office on _____ (date) _____ and _____ (time) _____ and that you have indicated you will not allow me to take a sworn affidavit from witness X.

I must reiterate that by not allowing me to take a sworn affidavit from witness X you are not cooperating fully in the investigation. Absent the submission of such evidence, the Regional Director will make his/her decision based on the evidence available.

Sincerely,

Board Agent

EAJA Model Letter E

This will confirm my letter to you dated _____
in which you were requested to provide

(List evidence sought)

Having received no response from you, it would appear that you do not intend to cooperate fully in the investigation of this case. Accordingly, I ask that you present your evidence, including witnesses for the purpose of giving affidavits, by close of business _____ (date) _____. Absent the submission of such evidence, the Regional Director will make his/her decision based on the evidence available.

Sincerely,

Board Agent